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10/788,637	02/27/2004	Jeffrey Lynn Chamberlain		7226

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EXAMINER
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BERONA, KIMBERLY SUE

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/788,637  
Filing Date: February 27, 2004  
Appellant(s): CHAMBERLAIN, JEFFREY LYNN

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Charles Sutton  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 02/15/2012 appealing from the Office action mailed 09/15/2011.

**(1) Real Party in Interest**

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

**(2) Related Appeals and Interferences**

**(3) Status of Claims**

The following is a list of claims that are rejected and pending in the application:

Claims 1-5 and 15-20 are rejected

Claims 7-14 are withdrawn from consideration

**(4) Status of Amendments After Final**

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

**(5) Summary of Claimed Subject Matter**

The examiner has no comment on the summary of claimed subject matter contained in the brief.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

**(7) Claims Appendix**

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

**(8) Evidence Relied Upon**

5,857,431	Peterson	01-1999
5,944,516	Deshaies	08-1999
EP 780316	Derrieu	06-1997
6,092,489	Huettner	07-2000

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-3, 15-17 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Peterson, US Patent 5,857,431 in view of Deshaies, US Patent 5,944,516 in view of Derrieu, EP 780316.

Regarding claims 1, 15 and 19, Peterson discloses an apparatus comprising a reservoir (@20) having a wall, a fill aperture (column 3, line 63) and valves (18), the valves having pressure actuated opening means (reference Figures 3 and 4), the valves under pressure allowing liquid to exit the reservoir, the valves when not under pressure denying egress from the reservoir and wherein the valves are slits deformable by pressure. However, Peterson does not disclose the aperture having a closable openable cap. Deshaies teaches within the same field of endeavor the use of a fill aperture having a closable openable cap (22, Figure 2). It would have been obvious to one having ordinary skill in the art at the time of the invention to use the fill aperture

as taught by Deshaies as the fill aperture of Peterson as these were known functional equivalents in the art for filling an internal chamber with a substance and such modification would function in a known and predictable manner.

With respect to the limitation regarding the components of the invention being edible, Peterson clearly discloses that the apparatus is functionally capable of use when the material of manufacture is rawhide (column 2, line 5). Peterson further states that rawhide is a known functional equivalent to latex and rubber for manufacturing of the apparatus (column 2, lines 6-8). Peterson also details that the reservoir can be made of suitable materials being non-toxic to animals which include rubber (column 3, line 12). As Peterson has stated within the specification that rawhide is a known functional equivalent to rubber (per column 2, line 5) and that the reservoir can be made of a material such as rubber (column 3, line 12), it would have been obvious to one having ordinary skill in the art at the time of the invention to manufacture the reservoir from rawhide s these are two known functional equivalents for the manufacture of chew toys and it has further been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416. As such, Peterson as modified teaches an edible and biodegradable apparatus.

Further regarding the edibility of the fill cap, Deshaies clearly discloses the use of a fill cap for allowing fluid into a reservoir but does not state that such cap (i.e. valve) is biodegradable. Derrieu teaches within the same field of fluid filling valve the use of a biodegradable valve for the filling of a reservoir. As such, it would have been obvious to use the biodegradable material as taught by Derrieu as the material of manufacture for the valve so as to

provide an ecologically friendly apparatus. It has further been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416

Regarding claims 2 and 16, Peterson further discloses an outer layer enclosing the wall having an aesthetic design (column 2, lines 1-8) is edible (column 2, line 5).

Regarding claims 3 and 17, Peterson in view of Deshaies in view of Derrieu discloses the invention substantially as claimed but does not positively disclose the use of indicia. It would have been a matter of obvious design choice to one having ordinary skill in the art at the time of the invent to apply indicia to the device since the applicant has not stated that the indicia is for any particular purpose or solves a stated problem not obvious to one having skill in the art and the invention would function equally as well absent the indicia.

Claims 4 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Peterson, US Patent 5,857,431 in view of Deshaies, US Patent 5,944,516 in view of Derrieu, EP 0780316 as applied to claim 1, above and further in view of Hass, US Patent 5,961,406.

Peterson as modified per claim 1 discloses the invention substantially as claimed. However, Peterson as modified does not disclose the use of a cord attached to the apparatus. Hass teaches within the same field of endeavor the use of a cord attached to an animal apparatus as a means for holding the device without having to contact the wet device after the animal has chewed on it. It would have been obvious to one having ordinary skill in the art at the time the invention was made to apply a cord to the device of Peterson as modified as taught by Hass in

order to enable the owner to carry the device without having to contact the chewed portion of the device.

Regarding claim 18, as the cord of Hass is attached to the apparatus, it thereby inherently has an attachment means being attached to the apparatus.

Claims 5 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Peterson, US Patent 5,857,431 in view of Deshaies, US Patent 5,944,51 in view of Derrieu, EP 0780316 as applied to claim 1, above and further in view of Huettner et al., US Patent 6,092,489 (Huettner).

Peterson as modified per claim 1 discloses the device substantially as claimed. However, Peterson as modified does not disclose the use of a noisemaker. Huettner teaches within the same field of endeavor the use of a noisemaker within a reservoir for exciting the animal. It would have been obvious to one having ordinary skill in the art at the time the invention was made to apply the noisemaker as taught by Huettner to the device of Peterson as modified in order to excite the dog and thereby entice the animal in the use of the device.

#### **(10) Response to Argument**

**The elected embodiment for the prosecution of the Application is directed to the embodiment depicted in Figures 8 and 9.**

#### **35 U.S.C. § 103(a) rejection of claim 1**

Appellant's argument: Equivalence must be recognized in the prior art and cannot be based on applicant's disclosure.

Peterson discloses at column 3, lines 6-13 that "The shell or casing 12 is formed from any suitable material that has a sufficient elasticity to retain its original shape, that does not disintegrate upon repeated biting there into, and that is sufficiently compressible to enable the animal to bite the device. The material must also be non-toxic to the animal. Suitable materials include natural rubber, polyurethane, polyethylene and similar synthetic resinous materials." Peterson further discloses that at column 2, lines 1-8 that "A wrapping may be disposed around the shell, the wrapping having openings formed therethrough which are in communication with the openings in the shell. The wrapping may be of any suitable construction to attract an animal, for instance rawhide....The wrapping may also advantageously be made of a flexible or pliant, non-toxic substance such as latex or rubber." As is viewed in Figure 6, Peterson discloses the use of a wrapping disposed around the shell, the wrapping having a plurality of slits (414, column 4, line 51) that communicate with the plurality of slits in the shell, thus allowing fluid from the hollow interior to issue through the slits into the mouth of an animal. As such, the slits in the wrapping must function in the same manner as the slits in the shell so as to allow the fluid to issue through the slits. Given that Peterson discloses that the shell may be made from rubber and that when speaking in regards to the wrapping, that the wrapping may be made from rubber or rawhide, Peterson has provided an equivalency between rubber and rawhide functioning in a manner so as to be compressible for the deformation of the slits so as to allow fluid to flow therethrough. As such, it is the teaching of Peterson from which the equivalency of materials was found and not from the disclosure of the Appellant.

The Appellant's own description of related art at Page 2 of the specification states that "Chewable dog toys are known in the art. They are often a plastic or rubber article...they may



also be composed of a substance which is edible to the dog, such as rawhide.” As such, the Appellant’s own disclosure of admitted prior art provides a basis for the functional equivalency of rawhide and rubber to provide the material of chewable dog toys. Further within the specification, the Appellant states that “The reservoir would be composed of an inexpensive, resilient and durable substance...Among the possible forms of reservoir would be a plastic reservoir or a flexible metallic bag reservoir” (page 6, lines 14-19) which provides that the material of choice for the reservoir is not a critical feature of the apparatus and the apparatus would function equally well with the use of a plastic reservoir or rawhide reservoir. As both types of materials were known to be functional equivalents in the prior art (seen in both the Appellant’s disclosure of admitted prior art and the teaching of Peterson), it is maintained that the use of rawhide for the material of manufacture of the reservoir would be obvious to one having ordinary skill in the art.

The appellant argues that “Peterson states that integrity of the shell is paramount during the impregnation of the shell by any odorant.” However, Peterson states that an odorant may be added to the wrapping as well (column 2, lines 9-10) which thereby supports the Examiner’s contention of equivalency of material between the shell and the wrapping.

Concerning the Examiner’s contention that the edible cap disclosed by this claim has been taught by Derrieu:

The Appellant argues that “Whether such plastics may be biodegradable or not, they are not among the classes of materials anyone would regard as being edible to a dog.” However, the Appellant has not stated what is to be included and excluded by the terminology “biodegradable” per claim 15 or “edible” per claim 1. It is notoriously well known that dogs are capable of eating

a variety of items that may not necessarily be considered edible. The Appellant has not stated that the cap must be digestible, merely that it is edible. The Appellant's specification further states that "The outer layer, valves, cap, fill aperture, and reservoir could all be made of.....biodegradable, expandable, indigestible substances such as wood" Wood is generally not recognized as being a material considered edible by a dog. As such, the argument directed to the Derrieu reference not being directed to "the classes of materials anyone would regard as being edible to a dog" should not be found persuasive.

Applicant further disagrees that Derrieu is in the same field of art as his dog watering toys:

The Derrieu reference is directed to the use of a fluid dispensing valve attached to a fluid containing reservoir. The Examiner maintains that the Derrieu reference is in the same field of endeavor.

**35 U.S.C. § 103(a) rejection of claims 2-3, 15-17, 19**

The arguments under this section are a reiteration of the arguments presented for claim 1. As such, the discussion above with respect to claim 1 is incorporated herein.

The Appellant argues that "Peterson doesn't even have a cap, as Examiner admits in the sixth and seventh lines of her paragraph 6 of the September 15, 2011 final rejection." The Appellant is correct in pointing out the statement that Peterson does not disclose a cap. However, the Appellant is silent to the teaching reference of Deshaies which clearly teaches the use of a filler aperture having a closable openable cap. As no argument has been made regarding the combination of the Peterson and Deshaies reference, no further explanation is deemed necessary.

**35 U.S.C. § 103(a) rejection of claims 4 and 18**

The discussion above with respect to claims 1-3, 15-17 and 19 is incorporated herein.

The Examiner is incorrect in her application of Deshaies to her obviousness analysis of claim 4.

The Deshaies reference was relied upon solely for the teaching the use of a closeable openable cap (22, Figure 2) for the filling of an internal chamber with a substance. As such, the arguments with respect to Deshaies discussion of prior art rope bones stating that dogs could tear apart large pieces of rope and choke on them is not understood as being pertinent to the rejection of record.

**35 U.S.C. § 103(a) rejection of claims 5 and 20**

The discussion above with respect to claims 1-3, 15-17 and 19 is incorporated herein.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/KIMBERLY BERONA/

Primary Examiner, Art Unit 3644

Conferees:

Heather Shackelford /hcs/

Joshua Michener /JJM/